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# REGULATING THE PROFESSIONS

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## I. INTRODUCTION

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THIS Chapter provides an overview of some of the key questions about the regulation of professions and examples of research done to assist in providing answers to

those questions. As will be seen, two key issues demanding empirical answers have been the degree of tension between the interests of the profession and the public in regulation, and the most effective methods of regulating professions. Many of the studies described in this Chapter demonstrate well the important relationship between theory and practice: empirical studies have proved essential in testing theories critical of the public-regarding claims of professions themselves. Conversely, open-ended inquiries into actual influences in the day-to-day conduct of professionals have generated theories as to the importance of a broad and complementary range of regulatory strategies and sources of regulation and, perhaps ironically for empirical legal studies, the limited role that formal law often plays in the face of more informal norms.

Regulation generally is a burgeoning area for empirical legal research, largely due to higher rates of formal regulation in society through legislation, regulatory instruments, and codes of conduct but also to a greater appreciation of influences upon conduct that go beyond formal law. At its narrowest, regulation may refer only to the enforcement of legal rules by the state or other legally sanctioned formal bodies. But empirical studies have confirmed the importance of the much broader view taken in the discussion which follows: the regulatory mix to which professions are subject includes not only regulation applied through entry controls, certification, and licensing requirements, professional discipline, and civil and criminal liability, but also the influence exerted by professional indemnity insurers and "softer" informal forms of regulation (including those found in places of practice such as hospitals and law firms), and by individual colleagues and consumers of professional services.

In the next section we look at empirical studies that have sought to provide insight into the possible tension that might exist between the interests of the profession and the public in regulation before moving to the question of the most effective regulatory "mix" for professions.

## II. IN WHOSE INTEREST—THE PROFESSION OR THE PUBLIC?

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Early empirical research into professions did not consider a possible tension between the interests of the professions and those of the public and often worked from an assumption that, provided a group of service providers could demonstrate all the traits of a profession, that group could be trusted to self-regulate with the best interests of the public in mind. This assumption largely reflected the work of those, such as Parsons (1954), who theorized about a profession that would fully subsume its self-interest in the public interest.

However, as critiques of professions and trait theory became more common, such research was considered to be of little social value, except to occupational groups wanting to legitimate claims to professionalism and prestige. One of the most influential critiques of the professions was by Larson (1977), who doubted the altruistic motives of professions. Instead, she thought they engaged in a professional project of market control and collective upward social mobility. This project was not static but engaged in “at different times by different groups of professional reformers, using the resources that were accessible in their specific environments” (ibid: 104) and according to particular pressures they experienced.

Theoretical work such as this created a need to test these competing claims empirically—did regulation work more to the benefit of members of the professions or to those they claimed to serve? A number of aspects of regulation might provide insight into this question. We consider some of them below: self-regulation; market closure; quality; front-end entry controls; public protection vs. public interest; and professional boundaries. Others might include restrictions on advertising and on business structures.

## A. Self-regulation

The power to self-regulate is often seen as a key feature of professionalization, and empirical legal studies have taken a close interest in efforts and attitudes around obtaining or strengthening statutory self-regulatory powers, including the attitude of traditional professionals toward efforts by competing service providers themselves to become self-regulating (Kelner et al., 2004). The relationship between the state and professions here can be a complex one. The profession wants to be seen as fearlessly independent of the state but often requires the support and cooperation of the state to entrench and legitimate its monopoly of practice and power to self-regulate. In some cases it has been found that it is the state that initiates the granting of the monopoly to a profession in the state's interests (Dingwall, 2006: 137). The complexity of the relationship between the state and professions not only serves to warn us of the danger of considering only a dichotomy between professional *or* public interest—because the state itself has an interest—but also makes it a rich area for empirical investigation.

Empirical studies have also attempted to gauge how successfully professions have self-regulated in the public interest. This can be measured in many ways. For instance, quantitative studies have analyzed the number of complaints upheld after investigation by professional bodies, or the number of professionals formally and publicly disciplined by their peers. Qualitative, observational studies have provided valuable insights into phenomena not easily quantified, such as how professionals

respond when they believe their own work or that of a colleague may have caused harm to a consumer.

Some studies into the efficacy of self-regulation have been criticized for too readily assuming causal relationships. For instance, quantitative studies that analyzed the number of disciplinary prosecutions by regulators and the outcomes of prosecutions as the basis for conclusions about the degree of self-interest were sometimes criticized as overly simplistic. Halliday (1987: 350), in his empirical study of the Chicago Bar Association, sought a more nuanced approach than “vulgar monopolistic theories” relating to self-regulation that discounted the possibility of multiple causes and motivations, complaining of the conclusions in some other studies that:

one consequence or even intent of professionalism becomes the *raison d'être* of the entire professionalization enterprise. The part is taken for the whole. Latent consequences become explicit intents; accompanying motives become sole bases of action. Results of professionalization are assumed to be the outcome of a professional “project.” In a word, the entire interpretative model is overdetermined.

In a similar vein, Pue (1990: 405) notes that professional discipline is only one way in which a profession can control its members and is critical of the assumption made by some researchers that a lack of formal professional discipline necessarily assumes a failure to self-regulate and more particularly, a lack of *will* to self-regulate.

We will take up Pue’s distinction between formal and informal regulation later in this Chapter, but his comment also reflects greater recognition that there is no simple or linear relationship between intentions and regulatory outcomes and further, that regulation might sometimes simultaneously serve the interest of both the profession and the public (Parker, 1999: 119). In recognition of this, qualitative studies that seek to explore the state of mind and aspirations of professionals have become more common. Such studies have recognized that, despite the best intentions of professionals, structural impediments or a lack of resources or expertise may restrict their ability to implement their public-regarding aspirations. Conversely, some studies have documented the frustrations felt by professionals who feel less able to provide optimal care to consumers in bureaucratic settings where self-regulation is weakened and that appear to the professional to prioritize managerialist concerns of cost and time efficiencies over expertise and optimal outcomes for individual consumers.

Self-regulation in the public interest assumes colleagues will take some action when they become concerned about the conduct of their colleagues. Numerous studies have found professionals reluctant to adversely comment or report on the work of their colleagues (e.g., Waring, 2005). Agreement on the reasons for this reluctance has proved more elusive. For those who believe self-regulation is part of a profession’s self-serving project, this is taken as clear evidence that they cannot be trusted to self-regulate. Others argue that the reasons are many and more complex, and might include that colleagues consider quality difficult to measure, or that it is a breach of the autonomy of individual professionals for others to comment on their

work. Nonetheless, empirical evidence of a disinclination to take action has obvious implications for claims to self-regulation.

## B. Market closure

Another key feature of professions is that members have been given an exclusive right to provide certain services. In other words, there is market closure. The usual justification is that this is necessary in order to serve the public interest. Such claims spawn a number of empirical questions. These include: how such monopolies came about; how they have changed over time; what part the state, professions themselves, and interest groups have played in their creation and maintenance; and the degree to which such closure has enhanced or detracted from the best interests of the public.

Empirical studies might consider how market closure protects the public in an absolute sense. For instance, what evidence is there that services provided by professionals lead to fewer adverse events or are of generally higher quality than those provided by unqualified individuals? A distinction needs to be drawn between protecting the interests of current consumers of professional services ("absolute" protection) and protecting the wider public interest, including protecting members of the public seeking at least some level of service ("relative" protection). We will look at studies exploring a more "absolute" understanding of protection in more detail first before exploring the notion of public protection in a wider, more relative, sense.

## C. Quality

One way to test the claim that monopoly is in the public interest is to consider how well non-professionals can provide a similar service. It will be difficult to get comparative empirical data if a profession's monopoly is strictly enforced; but as discussed more fully later, professionals have policed the boundaries of their monopolies with varying degrees of vigilance, and it is perhaps no coincidence that it is in less lucrative areas of practice, such as legal aid (Moorhead et al., 2003) and tribunal work (Kritzer, 1998) that researchers have found adequate numbers of non-professionals providing assistance to make comparison possible.

In the past it was generally agreed that it was difficult to assess the quality of the types of services traditionally supplied by professionals. Indeed, this was one justification for giving a monopoly over the supply and regulation of the service to professionals in the first place—only this highly educated and certified

group had the necessary knowledge and insight to regulate the quality of services provided; and so they would need to be trusted to self-regulate in the public interest. Nevertheless, some (including Moorhead et al. in the United Kingdom (2003)) have attempted to study objectively the relative quality of services provided by, and the relative competence levels of professionals and unregulated non-professional providers of, legal services. Studies such as this, which aim to assess quality and competence against an objective standard, face methodological difficulties. Service recipients are the most available source of information, but may lack expertise or give only subjective accounts influenced by their satisfaction with the outcome or the professional's "bedside manner." If we accept that professional status is based at least partly on technical expertise, informational asymmetry, and professional mystique, reports from user groups may be useful for measuring consumer perceptions of professional competence, but are of much less value to the researcher seeking some objective measure of quality. Moorhead et al. overcame this difficulty by supplementing client surveys with covert observation and assessment by trained "dummy" clients and external peer review of files. Their study concluded that there was very little difference in the quality of the services provided by the professionals and the unregulated service providers respectively.

Given the difficulties of measuring quality directly, some studies have sought to use proxies for quality, such as the length of time a patient may need to wait for dental assistance. Not surprisingly, the value of proxies such as these has sometimes been questioned.

As we will see later, empirical work has alerted us to the significance of informal influences as well as formal mechanisms in regulating professional conduct. Of the formal influences, complaints and professional discipline have often been considered of central importance, and it is largely through complaints and discipline that professionals have traditionally exercised self-regulation. We have mentioned some of the shortcomings of complaints and disciplinary systems already, arising both from the reluctance of professionals to report their colleagues and the failure of clients, for various reasons, to detect and complain about sub-standard work. More fundamentally, some theorists attribute to complaints and disciplinary systems very little power to explain the professional project of self-regulation and the way self-regulation can be used to promote the interests of professions. For instance, Larson mentions professional discipline in her 244-page monograph only in a footnote (1977: 229). This may be because by the time a complaint is made, the professional in question has already been deemed fit and proper to join the ranks of the profession, and it might prove difficult now to successfully portray him or her as a "bad apple" and punish them or expel them from the profession. Instead, Larson gives much closer attention to "front-end" controls such as barriers to education and qualification, and enforcement of monopolies over areas of practice.

## D. Front-end entry controls

Not surprisingly then, given their importance to such theoretical critiques of the professions, much empirical work has been done on entry controls and restricted practice. Comparisons of the cost of education or pass rates in entrance exams (Schenarts, 2008) with subsequent incomes, cost, supply, or quality in particular professions have led to conclusions that some professions were manipulating entry controls to maximize their own income and prestige with little eye to the best interests of the public. However, some such studies have been criticized as being simplistic and for failing to take account of the many possible factors at play in determining the cost, supply, and quality of professionals. These include innumerable factors beyond the cost of education, including some that may not spring immediately to mind, such as quality of life, tax rates, and mortality. For instance, while empirical studies might show that physicians earn 32.5% more than dentists and that only half of this can be accounted for by the higher education costs incurred by physicians, it would be wrong to conclude from this that physicians were benefiting from market imperfections if other evidence suggests that physicians work longer hours than dentists or experience higher levels of taxation or work-related mortality (Olsen, 2000: 1024). Rhode (1985) examined the way character requirements were applied by various states of the United States in individual applications for admission and concluded that there was great inconsistency among them. This, combined with other empirical and theoretical work suggesting the questionable predictive ability of character testing, led Rhode to argue that the front-end controls applied through admission procedures could not be justified and were more likely to be part of the legal profession's effort to restrict competition and enhance status.

## E. "Relative" public protection

The research considered so far has been concerned primarily with a public interest in protecting the interest of consumers in the availability of high-quality professional services ("absolute" protection). However, there is also a broader public interest in maintaining the supply of an adequate range of professional services at an affordable cost ("relative" protection). Much empirical work has been done to test the degree to which professional monopolies and other regulatory controls might be adding unnecessarily to the cost of professional services or limiting their supply (Yang et al., 2008) or range.

For instance, Paterson et al. (2003, "IHS study") were asked by the European Commission to consider "the justification for and effects of restrictive rules and regulations in the professions" across Europe. The study compared the legislation,

regulations, and codes of practice governing the legal, accountancy, architecture, and pharmacy professions in a number of member states of the European Union, and linked this with an assessment of the economic effects of different degrees of regulation to determine if various levels of regulation were "too high." The implicit bias in such an approach is toward deregulation and perhaps an assumption that preexisting levels of regulation have been primarily in the interests of the professions rather than the public. Indeed, the IHS study took it as a given that less regulation, greater competition, and lower fees were intrinsically good outcomes, and did not test or control for quality. The implied assumption that quality remains constant regardless of the intensity of regulation was the basis for much of the later criticism of this study (Henssler and Killian, 2003; Terry, 2009).

Professionals may face competition not only from foreigners seeking local rights of practice. The challenge may also come from within. For instance, alternative providers of health care, such as naturopaths and practitioners of traditional Chinese medicine, to name just two groups, have become increasingly popular with consumers seeking alternative forms of care. While the medical profession has often lobbied hard against the recognition of such alternative health services, Dingwall (2006: 136) has noted that this is not always the case: in some situations the medical profession has recognized that the existence of alternative health service-providers has in fact increased the consumption of health services rather than threatened the market and authority of the medical profession.

To close markets effectively, it would seem necessary to define the boundaries of that market. But as we will see below, more recent critical empirical studies have documented the poor track record of professions in being able to adequately define the boundaries of their area of monopoly, and their differing responses when it might seem that non-professionals or other professional groups were encroaching. This indeterminacy has provided some ammunition to those who argue that regulation is primarily for the benefit of the profession rather than the public.

## F. Professional boundaries

It may seem curious to those who have not studied the regulation of professions closely that it has sometimes proved difficult to define the sort of work that comes within a particular profession's monopoly of practice. It would seem hard for any regulator to enforce an amorphous boundary. Fournier (2000: 71) describes studies that have tracked the way in which particular professional fields of knowledge such as medicine and accounting (Hopwood, 1987) have come into existence and continued to evolve.



Perhaps in recognition of the difficulty of defining an area of monopoly to a level that would satisfy courts in formal prosecutions of non-members for unauthorized practice in breach of the monopoly, professional groups have sometimes cooperated to carve out areas of monopoly for each other (American Bar Association, 1995: 23). While such agreements clearly benefit the professions involved, empirical studies have sometimes found it difficult to identify how they benefit the public: while they might save a regulator the expense of a prosecution, the nebulous boundary may suggest a prosecution would not have been warranted in any case.

If a profession itself appears at times ambivalent about enforcing boundaries, their public protective function might seem questionable. Particularly if professionals appear most active in policing the supply of services for which they are most handsomely rewarded, rather than those of most risk to consumers, the public-regarding nature of the professions must be questioned. As noted earlier in our discussion of testing the quality of professional services, it is perhaps not surprising that it was in the less lucrative areas of legal aid (Moorhead et al., 2003) and tribunal work (Kritzer, 1998) that researchers encountered a more lax enforcement of boundaries that made it possible to compare the quality of services provided by professionals and non-professionals. It is perhaps notable in this regard that some definitions of unauthorized practice include only the supply of services for reward—the professions appear to have made much less noise about services provided for free.

One often-cited example of an empirical study that casts professions in a more positive light than some of those mentioned previously is that of Halliday (1987), who took an optimistic view of the potential of professionalization to benefit the public. He sought to overcome what he saw as simplistic theories of professions that assumed a simple dichotomy between self- and public interest. Larson had theorized that the impetus for professional groups to seek greater market control and higher social status changed over place and time, depending on the state of knowledge, markets, and resources available to professional groups to mobilize (1977: 104). Halliday developed this historical imperative and applied it to the Chicago Bar Association. He conceded that the association pursued its own interests when establishing its professional legitimacy; but, once established, it became much more outward-looking, displayed much more altruism, and performed a greater civic role—in other words, went “beyond monopoly.” Only in future periods of severe public scrutiny would it feel a need to refocus its energies on self-interest.

However, it would be wrong to use Halliday’s work as affirmation that professions will regulate themselves primarily in the public interest. According to Halliday, one precondition of going “beyond monopoly” is that a profession’s privileged monopoly position be entrenched; but regulation that truly pursues the public interest may weaken that monopoly. Second, while, as Halliday noted, the association continued to be interested in “soft” forms of regulation, such

as continuing legal education, licensing of specialist practitioners, and office management, even when its monopoly was entrenched (ibid: 353), its interest in ethics and grievance committees and the “harder” end of regulation that could lead to professional discipline and expulsion from the profession in fact declined during these times of prosperity (ibid: 352). This fluctuating interest in discipline casts doubt on the degree to which the association could effectively and fully self-regulate in the public interest. It also highlights the important *symbolic* role that professional discipline plays in a profession’s quest for legitimacy: discipline sends powerful messages about character and integrity in a way that more mundane activities such as continuing legal education and office management cannot.

A large proportion of empirical studies of regulation of the professions have been carried out in the United States, United Kingdom, Canada, and Australia, and have had a particular interest in various combinations of state, self-, and co-regulation and how these might enhance or detract from a profession’s social power, status, and legitimacy. This is not surprising given that the traditional professions of law, medicine, and the clergy were more significant sources of social status in English-speaking countries than in Europe, where status was tied more to a person’s place of education or employment: hence, Freidson’s reference to the “Anglo-American disease of professionalism” (1983: 26). As we move outside Anglo-American jurisdictions to places where less social prestige is derived from professional status and self-regulation, it is not surprising to see less interest in empirical studies into professions and their regulation. Some have argued that “Europeanization”—the expectation that professions will be similarly regulated across the various countries of the European Union—will alter the pre-existing regulatory balance between profession and state, and thereby diminish professional control and status; but Freidson’s comment suggests that UK-based researchers will perhaps be more concerned about exploring this than academics in mainland Europe.

In summary, despite the empirical studies that have been undertaken, we still do not know much about the degree to which regulation has worked in the interests of professions and to the disadvantage of the public. Part of the difficulty has been in obtaining data—protected professions can be coy about disclosing their levels of income, adverse service outcomes, and other relevant information. But, as the preceding discussion has sought to demonstrate, much of the problem lies in the complexity of the phenomena being investigated and the need for caution before ascribing causal relationships.

Having looked at some of the empirical work exploring the degree to which regulation of the professions has or has not protected the public, we turn now to a second, important area of empirical research dealing with the optimal mix of various regulatory techniques and sources of regulation, both formal and informal.

### III. BEST REGULATORY MIX

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We looked at self-regulation earlier in the context of a profession's ability to regulate in the public interest. In this section we include the question of self-regulation but consider it in combination with other potential forms of regulation and with different questions in mind: what regulatory techniques are used by effective regulators; what sources of regulation exist and can be best utilized for optimal regulatory outcomes; and what other, less formal influences on the conduct of professionals exist. We will look first at the regulatory techniques used by regulators—whether professional bodies or external—before turning to the question of multiple sources of regulation and finally, informal influences on conduct.

#### A. Regulatory techniques—the regulatory pyramid

Until empirical work uncovered a much richer picture, it was generally assumed that regulation consisted primarily of top down “command and control” of those regulated: regulatory agencies charged with enforcement demanded compliance, and failures to comply were met with more punitive responses by regulators. However, innumerable studies, such as the examination by Braithwaite et al. of regulatory styles of the regulator and perceptions of those being regulated within nursing homes (1990), found a much more complex picture. They found that most regulatory activity occurs at the base of what later Braithwaite coined a regulatory “pyramid.” Here at the base, regulators show respect for the autonomy of those they regulate and encourage personal monitoring. They engage in dialogue and employ incentives and encouragement to comply (in summary, they “speak softly”). However, effective regulators also ensure they carry a “big stick” while speaking softly and respond to failures to comply by escalating up the regulatory pyramid to more and more mandatory intervention and coercion by the regulator. At the apex of the pyramid is the regulator’s “last resort” (Hawkins, 2002)—formal prosecution for regulatory breach. Empirical work continues to be done in exploring some of these theories in the context of professions and professional places of work, and Braithwaite (2009: 31) has emphasized how important these regulatory questions are in the context of hospitals today, with the sheer range of professions working together using complex technology on vulnerable patients.

Studies of regulatory styles have also emphasized the normative content of much decision-making by regulators at all levels of the pyramid, including a tendency for regulators to require moral blame before they externally report or prosecute conduct, regardless of whether the legislation they are charged with enforcing purports to impose strict liability offenses (Carson, 1970; Hawkins, 2002).

## B. Regulatees

Similarly, just as empirical studies were important to test assumptions that command and control was the only style of regulation employed by regulators, they also provided important information about those subjected to regulation. The potentially corrupting influences on professional conduct were sometimes assumed to be the result of inherent character flaws—the “bad apple” who slipped through front-end professional admission controls. Qualitative, exploratory studies sought to find out from professionals themselves what they perceived to be the various influences over their conduct, both positive and negative, and their relative weight. Rather than assume that punitive, formal regulatory law was the primary source of influence, such studies have provided useful information as to the relative (and sometimes much greater) influence of factors such as client or employer support or pressure, a concern to please colleagues, reputational concerns, a desire to maximize income or prestige, workload, and training.

Empirical evidence such as this, which suggests that effective regulation requires regulators to use a mix of persuasion and command-and-control, and to acknowledge and harness the aspirational desires of those regulated, has also led to theoretical arguments about the futility of imposing legislative changes that move too far into risk-based, objective, and blame-free approaches: reporting of failure and risk often includes a normative element because it is reactive and arises out of dissatisfaction; and most would expect it to be part of a regulator’s responsibility to allocate individual responsibility where necessary (e.g., Lloyd-Bostock and Hutter, 2008: 79). While Lloyd-Bostock and Hutter were referring to regulation of the medical profession, their warnings should also be heeded by those designing effective regulation for other professions, particularly in Anglo-American countries where professions have strong, traditional aspirations of self-regulation and individual responsibility (Dingwall, 2006: 139).

In addition to studies into what mix of regulatory strategies a single professional body or regulatory agency might use, others have attempted to identify and measure the regulatory impact of a much broader range of sources, including civil liability and insurers.

## C. Multiple regulators

Past empirical studies into the professions can take some of the credit for revealing to us the pluralist nature of regulation. Unitary approaches were once assumed to be the only legitimate form of regulation, whether it was a professional body imposing its will on members or an external, independent statutory body responding to proven breaches of standards. Today it is accepted that a much broader range of

sources of regulation exists beyond dedicated regulatory agencies and is desirable in the regulation of professions as in all regulatory contexts. The role of the empirical researcher then becomes to provide evidence as to what regulatory mix exists or is optimal in various circumstances and for various professions.

The theoretical work of Wilkins (1992) has had a lasting impact on thinking about the regulation of the legal profession because it took a broader view of regulation than simply licensing, complaints, and discipline, which had been the earlier focus. Wilkins proposed a four-celled typology of regulation comprising disciplinary, liability, institutional, and legislative controls. Wilkins was not seeking to explore the regulatory techniques used by a single agency, as discussed in the previous section. Instead, his focus was the multiple sources of potential regulation, and his work struck a chord when it was published in 1992 because it came at a time when many empirical studies had focused on complaints and disciplinary systems applicable to lawyers and there was less theoretical acknowledgement, let alone empirical work reflecting the regulatory potential, of other parts of Wilkins' framework, such as tort liability, controls applied by courts and other similar institutions, and legislative forms of control applied by state administrative bodies. Wilkins theorized that it was important to consider who had the greatest incentive to enforce high professional standards and argued that in some contexts, disciplinary and liability controls have a tendency to duplicate each other and have limited regulatory impact, given that they both only respond to small client, agency problems such as overcharging and neglect: large, powerful clients are unlikely to complain when lawyers engage in misconduct under pressure from the client.

We noted earlier the degree of informational asymmetry between professionals and consumers and the lack of transparency around professional conduct, making it difficult for unsophisticated consumers of professional services to identify poor-quality work—and how this fact was used as a justification for professional monopoly and self-regulation. It also has consequences for determining the most effective source of regulation. Even when clients do identify, and suffer as a result of, poor quality work, many factors determine whether or not they will go on to lodge a complaint. They may lack the resources or skill to complain. Where a third party, such as an insurer or a legal aid or sickness fund, has paid for the provision of services, it may be less likely that either the consumer or funder of the service has sufficient information or incentive to lodge a complaint, creating a moral hazard for enforcement.

Clients are not always a good source of control for other reasons. Clients will sometimes profit from the actions of their professional adviser, such as where an accountant or lawyer assists in a client's scheme of tax evasion, and clients will do all they can to hide the assistance provided by the professional. On the other hand, some consumers of professional services are so large and powerful that the professional may need protection—or at least guaranteed independence—from the client. The most dramatic and intractable example of this arises in the auditing profession where client and market controls are obviously inadequate when the

legitimacy of the audit depends on the auditor's ability to demonstrate independence from the client. Empirical work has been done to find the effective form of regulation to protect auditor independence, although the results so far have proved inconclusive (Ramsay, 2001). While institutional controls, such as restraint proceedings in the courts, may effectively deal with externalities resulting from the provision of professional services, as when a lawyer assists a client whose activities cause harm to the community, Wilkins thought that such forms of control were vulnerable to misuse by large, powerful clients for tactical purposes against less well-resourced parties, thus reinforcing preexisting inequalities of access to the courts.

Empirical work in the United States has attempted to test some aspects of Wilkins' theory. A study by Joy in 2004 found that there was little duplication in the application of institutional (Rule 11) sanctions and professional discipline. Similarly, many of the studies of regulation of medical professions surveyed by Olsen (2000) looked at the interaction between medical malpractice and tort and licensing law. In the 1980s and 1990s, claims were made that the medical and legal professions were at least partly responsible for an explosion in the cost of tort claims, and that this justified the placing of further layers of regulation upon them. Empirical studies proved extremely useful in testing the veracity of such claims of a crisis and its potential culprits (Harvard, 1990). Work also continues to be done on the impact of the new sources of regulation—liability, insurance, and otherwise—on such factors as supply, cost, efficiency, defensive practice, and patient outcomes (e.g., Kessler and McClellan, 1996), although the results remain inconclusive and contested (Faure, 2009: 488).

We mentioned earlier that research hypotheses around the degree to which regulation promotes professional self-interest more than public interest may not strike a similar chord outside the United States and United Kingdom as they do in those countries. Equally, empirical findings on the existing and optimum regulatory "mix" may also be of doubtful relevance outside those same jurisdictions where there has traditionally been most interest in studying professions. However, the "policy pull" (Sarat and Silbey, 1988) on the empirical researcher to carry out comparative studies of regulatory mixes is becoming quite strong as a result, for instance, of the expectation that professions will be regulated across the European Union or, at least, that there will be greater harmonization of regulatory laws. This, of course, was the driver for the IHS study mentioned earlier (Paterson et al., 2003).

Comparative work on the regulatory mix is underway. Empirical studies have concluded that health professions in the United States are much more subject to regulation by the medical defense organizations and insurers that provide them with indemnity than by state management of markets—as occurs in the United Kingdom (Dingwall, 2006: 132). In Germany, sickness funds play a major role in regulation because of their strong economic interest in restricting the cost to them of financing



health care, leading to less concern about regulating quality than in state-centered forms of regulation such as that in the United Kingdom (Kuhlmann, 2009).

Each source of regulation is likely to reflect its particular priorities and *raison d'être*: sickness funds in Germany focus primarily on reducing cost; internal ombudsman schemes try to settle consumer complaints as quickly and informally as possible, for instance by requiring the professional service-provider to apologize to the patient or client; a professional indemnity insurer will be concerned lest informal apologies or payments compromise its control over civil liability proceedings, but will still be pleased to see any civil claim resolved to the satisfaction of the individual plaintiff without the expense of court proceedings. A state-based regulatory body may be more concerned to uncover and respond to systemic failings in the provision of services by professionals. These various forms of regulation may be in tension with one another. For instance, the best way to "protect" a person already harmed by a professional may be to compensate that person for their losses; but if such compensation is provided on an informal, confidential basis without a public hearing into the harmful conduct in the form (for instance) of a civil trial for professional negligence or professional disciplinary proceedings, the result may be potential harm to the public more broadly and into the future as the professional remains in practice (Abel, 2003: 489).

#### D. Informal regulation

For many years, work has been done on the formal and informal ways in which the work of health professionals is controlled. Heimer (1999) spent a year in the field observing legal and other norms guiding interactions among doctors, nurses, and non-professionals in a neonatal ward. She observed daily routines and staff meetings of the neonatal intensive care unit, interviewed staff and parents, and reviewed medical records and the laws governing the practice of neonatal law, to provide a detailed assessment of the different impact that civil, criminal, and regulatory laws had on medical decision-making alongside the influences exerted by the norms of medical and familial institutions. She concluded from her observations that laws will vary in the degree to which they actually impact on actual behavior within organizations when competing against medical and family norms, depending on the degree to which the laws were insinuated into daily organizational demands. The higher-status health professionals, such as physicians, had a greater say in whether or not this occurred.

Heimer's study is an example of the many studies of informal regulation of the medical profession that occurs in hospital settings, which epitomize a group workplace and are likely to provide optimum opportunities for the operation of informal influences over conduct. By way of comparison, in 1975 Freidson published his seminal article about doctors practicing outside the hospital setting, *Doctoring*

*Together*, which recognized the informal controls operating between medical practitioners even when not working closely together on a daily basis. Nelson's *Partners with Power* (1988) was an early study of informal regulation within the legal profession, focusing on a large organization arguably analogous to a hospital—a big law firm. Mather et al.'s work (2001) on divorce lawyers was an important step forward because it recognized that even sole-practitioner lawyers operated within various communities of practice. While not necessarily within their immediate place of work, Mather et al. found that solo lawyers still drew understandings of norms and expectations from numerous other communities of practice, such as the profession within their state, colleagues from other firms with whom they interacted, and the courts and other forums within which they practiced.

While it is useful to acknowledge the ways in which formal and informal forms of regulation can complement each other, it should also be acknowledged that they can be in tension. For instance, while there are perhaps advantages for consumers, colleagues, and institutions in encouraging private apologies and settlements, these may compromise more formal action against the same individual in relation to the conduct for which the apology was received.

## E. Comparing the regulatory mix across borders

Studies comparing the regulatory mix applying to professions in different jurisdictions have become more common in recent times. Such studies may be driven by the need for regulation and regulators to respond to the globalization of professional practice, which creates at least the perception of a need to establish trans-national regulatory frameworks or, alternatively, at least to adapt existing regulatory norms to achieve greater harmony among states. For example, Kuhlmann (2009) compared the dynamics of the regulation of medical professions in the UK and Germany to identify diverse drivers of change and to explain why the state plays a more influential role in the United Kingdom. She also found that state support through legislation for self-regulation by nurses and suppliers of alternative and complementary medicine was much less advanced in Germany than in the United Kingdom. She argued that one result of this relatively weak state regulation in Germany has been greater “bottom-up” informal regulation, such as through voluntary quality-support networks (ibid: 523). Also relevant to the issue of the effective “mix” of regulatory mechanisms across traditional borders are studies into the effectiveness of legal transplants, such as that by Dezalay and Garth (2002): they can tell us about the potential for “softer” regulation through professional culture and norms across state borders. However, this is not an area for the fainthearted empirical researcher. There is much complexity and the danger of ethno-centric understandings of central concepts, such as “self-regulation” and “self-administration,” which can have fundamentally different meanings in different jurisdictions even among the countries of Europe (Henssler and Kilian, 2003: 13).



## IV. CONCLUSION

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What have we learned from empirical studies into the regulation of the professions? How successful have they been in testing theories about professions? The answers to these questions depend on a number of factors. Certainly, more narrowly framed investigations into regulation have sometimes tended to confirm theories that argue that regulation often speaks to the interests of the professions themselves rather than the public. However, as commentators such as Lewis, Pue, and Halliday have rightly pointed out, narrowly framed research questions, for instance ones that focus only on formal professional discipline, sometimes make overly wide claims about the failure of self-regulation. The empirical studies undertaken to date have alerted us to the great complexity of regulation of the professions. Causal relationships and intended consequences cannot be assumed. Regulators and those regulated sometimes aspire to high standards in discharging their roles, but are hampered by a lack of resources. Regulation might take many forms, and one of the most important revelations from empirical studies done to date has been the importance of recognizing and embracing a plurality of regulatory forms and the danger of assuming the central importance of law in regulation. We have discovered that often much more informal norms most influence the way professionals conduct themselves. The ongoing challenge for empirical studies is to find ways to adequately investigate and uncover the inter-relationship between various forms of regulation, both formal and informal.

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